No. 21802

In the

United States Court of Appeals

For the Ninth Circuit

MARICOPA TALLOW WORKS, INC., W. J. GIESZL, THOMAS E. LEWIS, NED LEWIS, T. L. BERGEN, ROBERT L. POER, and ANAHEIM CITRUS PRODUCTS, INC.,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR REHEARING

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The petitioners in the above entitled cause, by and through their attorneys undersigned, respectfully petition the Court to rehear en banc the matters determined by the Court's order of October 13, 1967, denying petitioners' application for a writ of mandamus. The following grounds support this petition.

1. The issue presented by the appeal from the District Court's order[1] denying a motion to quash a grand jury subpoena duces

[1]Although the order appealed from was held not to be appealable under 28 U.S.C. Sec. 1291, this Court, in its opinion of August 16, 1967, denied the Government's motion to dismiss the appeal and considered the appeal as a petition for a writ of mandamus because of the "substantial question which the appellants are entitled to have decided." Opinion, p. 2.

tecum in an antitrust investigation of the Arizona tallow industry is whether the officers, shareholders and directors of a closely-held corporation, who are in actual close personal contact with the matters called for by the subpoena and with the day-to-day operation of the corporation, can assert their own personal privilege against self-incrimination as to the production of documents which may, as a practical matter, incriminate them personally.[2] The subpoena itself calls for numerous documents[3] indicating that the Government seeks by this means to establish the extent of participation in the corporation's pricing and marketing decisions by all individuals connected with it. This question necessarily involves the weight and effect to be given *Wild v. Brewer,* 329 F. 2d 924 (9th Cir. 1964), which held that the Fifth Amendment privilege against self-incrimination was not available to a solely owned corporation with respect to its records and papers so as to prevent compliance with an administrative Internal Revenue subpoena. Since this case arises in the context of an antitrust investigation, rather than an Internal Revenue investigation, different statutes are involved and *Wild v. Brewer* is distinguishable.[4] In a broader

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[2]The affidavit of Thomas E. Lewis (R. 11-12) shows that only two persons conduct the day-by-day administration of the corporation, that there are only three officers and three individual shareholders, together with another corporation owning less than 25% of Maricopa's stock, and that there are only four directors of the corporation.

[3]Documents are defined by the subpoena as originals and copies of all correspondence, memoranda or minutes, bulletins, inter-office communications, recordings or telephone conversations, meetings and conferences, reports, books of account, notes of personal conversations or meetings or telephone conversations owned by or in possession of the addressee relating to the persons responsible for pricing policy of the corporation, how prices are established, all cost studies and work sheets relating to prices charged, and all documents pertaining to the division and allocation of markets and stabilization of prices, together with desk diaries, appointment books, expense accounts, and memoranda of conversations with representatives of any other rendering company (R. 29-34).

[4]Two antitrust immunity statutes, 15 U.S.C. Secs. 32-33, prevent prosecution or the subjection to any penalty or forfeiture of a witness on account of any transaction, matter, or thing concerning which he may testify or produce evidence, documentary or otherwise, in a proceeding before

sense, however, the question presented by the petition following the District Court's order is whether, since the decision of a number of recent cases by the Supreme Court of the United States, the decision in *Wild v. Brewer* should stand, on the basis of strict Fifth Amendment analysis.

2. During the last five years, the Supreme Court of the United States has decided a number of cases, with increasing frequency, that establish the concept of guaranteeing constitutional protections in a practical, realistic manner. These decisions, set forth in detail in petitioners' brief, show that the Court has overruled the arbitrary distinctions in this area as to the availability of the guarantee based on the class of person involved that had formerly constituted an obstacle to the claim of privilege.[5] Within the past six months, two other such cases have been decided by the Su-

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the grand jury. 15 U.S.C. Sec. 24 provides that a violation by a corporation of any of the penal provisions of the antitrust laws is deemed also that of the directors, officers, or agents who authorized, ordered, or have done any prohibited acts, and punishes such conduct by fine or imprisonment. 15 U.S.C. Sec. 24 was enacted specifically to permit the conviction of corporate officers simply because they were responsible officers of a corporation found to be in violation of the antitrust laws, regardless of any showing of personal involvement in the conduct in question. See *United States v. Wise,* 370 U.S. 405, 82 S. Ct. 1354, 8 L.Ed.2d 590 (1962). There are no corresponding sections in the Internal Revenue Code.

[5]*See, e.g., Miranda v. Arizona,* 384 U.S. 436, 467, 86 S. Ct. 1602, 16 L. Ed.2d 694 (1966) (the privilege against self-incrimination secured by the Constitution applies to all individuals); *Johnson v. New Jersey,* 384 U.S. 719, 729, 86 S. Ct. 1772, 16 L. Ed. 2d 882 (1966); *Spevack v. Klein,* 385 U.S. 511, 87 S. Ct. 625, 17 L. Ed.2d 574 (1967) ("We find no room in the privilege against self-incrimination for classifications of people so as to deny it to some and extend it to others . . . we can imply no exception"); *Garrity V. New Jersey,* 385 S. U.S. 493, 87 S. Ct. 616, 17 L. Ed. 2d 562 (1967) (statements obtained when police officers were faced with a choice of self-incrimination or job forfeiture are inadmissable as evidence of guilt since this pressure constitutes coercion, preventing the free and rational choice of whether to waive the privilege); *Application of Gault,*——U.S.——, 87 S. Ct.1428, 1454——L. Ed. 2d——(1967) (the Fifth Amendment is "unequivocal and without exception . . . [T]he scope of the privilege is comprehensive"; the availability of the privilege does not turn upon the type of proceedings in which its protection is invoked, but upon the nature of the statement or admission and the exposure it invites).

preme Court of the United States sustaining its view that constitutional guarantees are to be construed in a realistic manner.[6]

3. In his dissenting opinion in *Wild v. Brewer,* Judge Madden believed that the question of whether a closely held corporation has the privilege against self-incrimination should be determined with reference to the test enunciated in *United States v. White,* 322 U.S. 694, 701, 64 S. Ct. 1248, 88 L. Ed. 1542 (1948):

> "Whether one can fairly say under all the circumstances that a particular type of organization has a character so impersonal in the scope of its membership and activities that it cannot be said to embody or represent the truly private or personal interests of its constituents, but rather to embody their common or group interests only."

Constitutional protections have been extended to partnerships as long ago as *Boyd v. United States,* 116 U.S. 616, 6 S. Ct. 524, 29 L. Ed. 746 (1886). That the *White* test is workable as to partnerships is shown in *United States v. Cogan,* 257 F. Supp. 170 (S. D. N. Y. 1966). The *White* test should also be applied to closely held corporations; petitioners commend to the Court Judge Madden's views in this regard. Under the recent Supreme Court decisions, whether the particular entity claiming the privilege is a corporation is no longer a useful inquiry, since that question does not advance inquiry as to whether the entity is so impersonal

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[6]In *Warden, Maryland Penitentiary, v. Hayden,* —— U.S. ——, 87 S. Ct. 1642, 1651, —— L.Ed2d —— (May 29, 1967), the Court abolished the distinction between "mere evidence" and "fruits of crime" for purposes of the validity of a seizure following a search without a warrant because "there is no viable reason to distinguish intrusions to secure 'mere evidence' from intrusions to secure fruits, instrumentalities, or contraband," thus rejecting a prior artificial distinction that had become unworkable in light of the expanding concept of Fourth Amendment protection. And, again this Term, in *Beecher v. Alabama,* 28 S. Ct. Bull. B. 127, 129-30 (Oct. 23, 1967), the Court held, in a case involving the admissibility of a subsequent confession given after a prior confession had been obtained as a result of illegal police activity, "the constitutional inquiry into the issue of voluntariness requires more than a 'mere color-matching of cases' "; it requires a "realistic appraisal of the circumstances" in which an accused finds himself.

that the personal privileges otherwise available to its participants have been lost.[7]

4. The direct effect upon the individual officers, shareholders, and directors should their corporate records be required to be produced cannot be overemphasized. Should such production be required, they would not obtain immunity under 15 U.S.C. Secs. 32 and 33, since these statutes only provide immunity should they themselves be required, pursuant to subpoena, to testify. And, under 15 U.S.C. Sec. 24, should the corporate records lead to the conviction of the corporation, conviction of the officers, shareholders, and directors would be possible simply upon the showing of the corporation's guilt and their position as responsible officers within it. Thus the officers, shareholders, and directors face criminal prosecution in the strict sense should the corporate records be required to be produced.[8] In addition to criminal liability in a strict sense, should the documents be required to be produced, the officers would also suffer in a manner that would make the assertion of their privilege costly even should only their corporation be convicted as the result of the production of the documents that are sought, by (1) the financial loss to the corporation,

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[7]The majority in *Wild v. Brewer* relied simply upon *Grant v. United States,* 227 U.S. 74, 33 S. Ct. 190, 57 L.Ed. 426 (1912), and *Wilson v. United States,* 21 U.S. 361, 31 S. Ct. 538, 55 L. Ed. 771 (1911). While these decisions have been followed through the years, courts have had difficulty with them in light of the more recent Supreme Court cases. *See, e.g., Hair Industry Ltd. v. United States,* 340 F.2d 510, 511 (2d Cir. 1965); *Wright v. Detwiler,* 241 F. Supp. 753 (W. D. Pa. 1964).

Given the clear expression of the Supreme Court's more recent views with respect to constitutional rights, it is apparent that it has overruled *Grant* and *Wilson* by implication. This Court, in treating petitioners' appeal from the District Court's order as a petition for a writ of mandamus, also recognized that petitioners' argument "is not wholly without merit and we are presented here with a substantial question which the appellants are entitled to have decided." (Opinion, p. 2)

[8]The Government itself has admitted that its purpose in seeking the corporate records is to seek to learn of individual violations of the antitrust laws as a result of its inspection of them. See page 8 of transcript of hearing of January 23, 1967; page 12 of respondent's answering brief, and R. 41.

and therefore to the officers, shareholders, and directors individually by reason of the criminal fine that would be imposed upon conviction, (2) the prospect of civil treble damage liability to the corporation and to its officers, shareholders, and directors, in addition to any criminal fine, (3) the resulting reductions in salaries and dividends able to be paid from a lessened amount of profit, and (4) the personal stigma attached to the officers, shareholders, and directors as a result of the conviction of the corporation because of their close connection with it and their equal guilt in the public mind.

5. The recent decisions of the Supreme Court of the United States make it clear that the protection of the privilege against self-incrimination should be extended to the present case. Taken together, they hold that the privilege cannot be made costly; it cannot be available to some and not to others. The fortuity of possessing a particular status cannot serve to deny the protection of the privilege, as to which no exceptions have been made in the Fifth Amendment and none can be implied. Most importantly, what is required in every case is a realistic appraisal of the circumstances in which an individual finds himself to determine whether the privilege should be available to him.

6. The decisions of the United States Supreme Court in *Wilson* and *Grant* that applied a rigid, arbitrary test to define the scope of the Fifth Amendment privilege have been implicitly overruled by the large number of its recently decided cases that have expanded the scope of the privilege. Thus, *Wild v. Brewer,* to the extent that its holding was based upon those two cases, should no longer stand. In addition, the existence of statutes in the antitrust field that have no counterparts in the Internal Revenue Code provide additional reasons for holding that *Wild v. Brewer* is not controlling and that the privilege against self-incrimination should be applicable under the circumstances presented by this petition.

For these reasons, therefore, the Court should rehear the petition en banc and reverse the order previously entered in this case.

Respectfully submitted,

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November, 1967

I certify that, in connection with the preparation of this petition for rehearing, in my judgment it is well founded and that it is not interposed for delay.

Paul G. Ulrich